United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-5031

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In re	
W. T. GRANT COMPANY, Bankrupt,	
FRANCES SWINICK, Appellant,	
-against-	Docket No. 76-5031
CHARLES G. RODMAN, as Trustee of the Estate of W. T. Grant Company, Bankrupt, Appellee.	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE-TRUSTEE

WEIL, GOTSHAL & MANGES
Co-Attorneys for the Trustee
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

Of Counsel:

Harvey R. Miller
William J. Rochelle, III

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Appellant,	:	
-against-	:	
CHARLES G. RODMAN, as Trustee of the Estate of W. T. Grant Company, Bankrupt,	:	
Appellee.	:	

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE-TRUSTEE

Issue Presented

The instant appeal presents the following question for determination by this Court:

Did the United States District Court for the Southern District of New York (the "District Court") err in determining that the bankruptcy judge did not abuse his discretion in (a) partially modifying the automatic stay of suits pursuant to Chapter XI Rule 11-44 to allow Appellant to appeal to the Appellate Division of the Superior Court of the State of New Jersey on the basis of previously filed briefs but without

oral argument, but not to the Supreme Court of the State of New Jersey, and (b) denying Appellant's request that she be awarded costs of the instant adversary proceeding?

Preliminary Statement

Appellant Frances Swinick ("Swinick") appeals from an order of the District Court dated July 1, 1976. The order, made by District Judge Whitman Knapp, affirmed an order of the bankruptcy court dated March 10, 1976. In the bankruptcy court, Swinick had commenced an adversary proceeding under Part VII of the Bankruptcy Rules to obtain a modification of the automatic stay under Chapter XI Rule 11-44 to permit her to proceed with two actions she was then prosecuting against W.T. Grant Company ("Grant"). The first action was a National Labor Relations Board unfair labor practice proceeding ("NLRB Proceeding"), and the second action was a civil action in the state courts of New Jersey ("State Court Action"). (A2-4).* In both the NLRB Proceeding and the State Court Action, Swinick was seeking essentially the same relief -- i.e., damages for having been dismissed by Grant allegedly as a result of union organizing activities.

Upon consent of Grant, then operating its business as debtor-in-possession under Chapter XI of the Bankruptcy Act, Bankruptcy Judge John J. Galgay partially modified the automatic

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* References are to the pages in appellant's appendix.

stay of suits on March 10, 1976, by permitting Swinick to (a) proceed with the NLRB Proceeding, and (b) proceed with her appeal then pending before the Appellate Division of the Superior Court of the State of New Jersey on the basis of previously filed briefs, and without oral argument, but no farther. (A24-25).

In essence, Swinick obtained nearly all of the relief she sought. The only relief she was denied was the right to appeal to the Supreme Court of the State of New Jersey. Bankruptcy Judge Galgay also declined to award costs that Swinick allegedly incurred in commencing the adversary proceeding. (A-25). Swinick appealed from the bankruptcy judge's order of March 10, 1976. On appeal, District Judge Whitman Knapp summarily affirmed the bankruptcy judge's order by an order dated July 1, 1976. Swinick then appealed to this Court from the order of July 1, 1976.

Consequently, the only substantial issue on this appeal is whether District Judge Knapp erred in determining that Bankruptcy Judge Galgay had not abused his discretion by refusing to permit Swinick to appeal to the Supreme Court of New Jersey and by denying Swinick her costs in connection with the instant adversary proceeding. Nevertheless, Swinick served a brief and purported appendix setting forth a host of facts that are outside of the record before this Court. Even if matters outside the record could be considered by

this Court, the bankruptcy judge still did not abuse his discretion.

For the convenience of this Court, appellee Charles G. Rodman, as Trustee of the Estate of Grant ("Trustee"), will set forth in this brief all of the facts relative to Swinick's disputes with Grant. The Trustee will indicate, however, which facts are in the record on appeal and which are not.

Statement of Facts

A. Background Facts in the Record on Appeal

On October 2, 1975, Grant filed a petition for an arrangement under Chapter XI, Section 322 of the Bankruptcy Act and Chapter XI Rule 11-6. Thereafter, and by order dated April 13, 1976, Grant was adjudged a bankrupt under the Bankruptcy Act.

On November 19, 1975, appellee was elected standby trustee in accordance with Chapter XI Rule 11-27. On April 13, 1976, appellee qualified as Trustee herein and has since acted in that capacity.

At the time Grant filed its petition for an arrangement, it was engaged in the business of operating and managing a chain of retail outlets for the sale of general lines of merchandise. Grant operated a total of 1,070 stores in 40 states and employed approximately 65,000 persons.

Swinick alleges that in 1973 she was unlawfully dismissed by Grant for her activities as a union organizer. (Tr.3).* She thereafter filed an unfair labor practice complaint against Grant with the National Labor Relations Board ("NLRB"), pursuant to section 8(a)(1) and (3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§158(a)(1),(3). The NLRB's administrative law judge concluded that Grant had engaged in unfair labor practices and ordered that Swinick be reinstated with back pay. (Tr.3-4). Grant excepted to the order of the administrative law judge, and on November 6, 1974, the NLRB reversed the conclusions of the administrative law judge and dismissed Swinick's NLRB Proceeding in its entirety. Swinick appealed the dismissal of the NLRB Proceeding to the United States Court of Appeals for the Third Circuit. In an opinion filed on December 30, 1975, the Third Circuit set aside the NLRB's order dismissing Swinick's NLRB Proceeding and remanded the case to the NLRB with instructions to hold a further evidentiary hearing in accordance with the court's opinion. Swinick v. NLRB, 528 F.2d 796, 801-02 (3rd Cir. 1975).

Subsequent to commencing the NLRB Proceeding, Swinick also began her State Court Action by filing a summons

* Record references in this form are to pages in the transcript of the January 26, 1976 hearing before Bankruptcy Judge Galgay. This transcript is part of the record on appeal, although it was not included in appellant's appendix. On December 28, 1976, the attorneys for the Trustee filed a supplemental index to the record on appeal and caused the January 26, 1976, transcript and certain other documents to be transmitted to this Court.

and complaint against Grant in the Superior Court of the State of New Jersey. In the State Court Action, Swinick alleged that she was unlawfully discharged by Grant and demanded the identical relief she was seeking from the NLRB. (Tr. 3-4, 8). Grant moved to dismiss the State Court Action on the ground that Swinick's claim was preempted by the NLRA. The Superior Court granted the motion and dismissed the State Court Action. (Tr. 4). Swinick appealed to the Appellate Division of the Superior Court of New Jersey. Grant and Swinick had both filed their briefs, and the appeal was awaiting oral argument when Grant filed its Chapter XI petition on October 2, 1975. Pursuant to Chapter XI Rule 11-44, the parties were automatically enjoined from continuing the appeal before the Appellate Division in New Jersey.

B. This Adversary Proceeding

Pursuant to Chapter XI Rules 11-61 and 11-44(d) and Bankruptcy Rule 701, Swinick commenced the instant adversary proceeding against Grant, as debtor-in-possession, by serving a summons and complaint dated December 29, 1975. (A1-4). In her complaint, Swinick sought a modification of the automatic stay to allow her to proceed with the State Court Action and the NLRB Proceeding. (A4). The debtor-in-possession served its answer to Swinick's complaint opposing any modification of the automatic stay of suits. (A8-11). The matter came on for hearing before Bankruptcy Judge Galgay on January 26, 1976 and

was continued to February 2, 1976, and March 1, 1976.* The debtor-in-possession consented to modifying the automatic stay so that the NLRB Proceeding could go forward in accordance with the Third Circuit's decision. (A24-25). To minimize the expense to the estate and to allow Swinick the relief she was seeking, the debtor-in-possession also consented to permit the Appellate Division in New Jersey to decide the pending appeal on the basis of previously filed briefs but without oral argument.** (A25). Although Swinick had appealed pro se to the Third Circuit, her attorney had served a brief on her behalf in the Appellate Division. (Tr. 7).

On March 10, 1976, the bankruptcy judge entered an order vacating the automatic stay as to the NLRB Proceeding and permitting the parties to go forward with the appeal pending in the Appellate Division in New Jersey. (A24-25). The order also denied costs requested by Swinick.

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* On an interim basis, Bankruptcy Judge Galgay entered an order on February 17, 1976. (A21a-21b). This order was superseded by the order of March 10, 1976. (A24-25).

** Had the parties been directed to hold an oral argument before the Appellate Division in New Jersey, the expense to Grant's estate would have been considerable. Grant would have been required to retain special counsel pursuant to Bankruptcy Rule 215 and Chapter XI Rule 11-22. To retain such counsel, Grant would likely have been required to pay the attorney the fees that had accrued prior to October 2, 1975. (Tr. 5-6). In contrast, Grant had in-house attorneys who could handle the NLRB Proceeding without additional expense to the estate. Accordingly, the Bankruptcy Judge did not abuse his discretion by giving Swinick nearly all of the relief she requested while ensuring that the estate would not incur any unnecessary expense.

C, The Appeal to the District Court.

On March 22, 1976, Swinick served her notice of appeal to the District Court from Bankruptcy Judge Galgay's order of March 10, 1976. Thereafter, Grant was adjudged a bankrupt on April 13, 1976; appellee qualified as trustee on the same day and has since acted in that capacity.

In her appeal to the District Court, Swinick did not serve a brief on either the Trustee or the bankrupt. Likewise, neither the Trustee nor the bankrupt received notice from the clerk as to the date on which Swinick's appeal would be heard in the District Court.

Having received no notice, the Trustee did not submit a brief or appear when Swinick's appeal came on for hearing before District Judge Whitman Knapp on June 29, 1976. District Judge Knapp reviewed the facts and entered an order on July 1, 1976, affirming the bankruptcy court's order. In his memorandum order, District Judge Knapp stated:

> "The order of Bankruptcy Judge Galgay is affirmed. The granting of costs is a matter firmly within the jurisdiction of the trial judge, and we cannot find that such discretion has been abused."

Thus, Swinick had a full hearing in the District Court. Although the Trustee neither appeared nor submitted a brief in opposition, District Judge Knapp nevertheless

recognized that Bankruptcy Judge Galgay had not abused his discretion by denying costs and by saving the estate the needless expense of an appeal to the Supreme Court of New Jersey.

On July 11, 1976, Swinick appealed to this Court from District Judge Knapp's order of July 1, 1976. Swinick failed to comply with Rule 30 of the Federal Rules of Appellate Procedure by not serving on the Trustee a designation of the parts of the record which Swinick intended to include in the appendix. Consequently, Swinick later served a purported appendix that lacks a number of important documents but includes a wealth of material outside of the record on appeal.

Swinick also caused the Clerk of the District Court to transmit what purported to be the record on appeal. However, the record as transmitted to this Court contained only the order certified below, copies of the docket entries, the notice of appeal, and the order and motion allowing Swinick to appeal in forma pauperis.

The Trustee therefore prepared a supplemental index to the record on appeal and caused the Clerk of the District Court to transmit certain other papers which are pertinent to the disposition of this case. These additional papers include Bankruptcy Judge Galgay's order of March 10, 1976, and the transcript of the hearing in the bankruptcy court.

Although the questions actually raised in this appeal are narrow, Swinick has nevertheless served a brief and a purported appendix setting forth a multitude of facts and issues that are not in the record on appeal before this Court.

D. Facts Not in the Record

For the Court's convenience, the Trustee will also set forth those additional facts that have been mentioned in Swinick's brief but that are not a part of this record on appeal.

Subsequent to Grant's adjudication as a bankrupt, the Appellate Division in New Jersey affirmed the trial court's order and upheld the dismissal of Swinick's State Court Action. Appellant filed a notice of appeal to the Supreme Court of New Jersey. However, upon being notified of the automatic stay under Bankruptcy Rule 401, the Clerk of the Supreme Court of New Jersey informed Swinick and the Trustee that the state court would take no further action in processing appellant's appeal.* (A26-27b).

On July 19, 1976, Swinick commenced a new adversary proceeding against the Trustee seeking a further modification

* As to the similarity of the stays in Bankruptcy Rule 401 and Chapter XI Rule 11-44, see the note at 17, infra.

of the automatic stays pursuant to Bankruptcy Rule 401 and the bankruptcy court's order of April 13, 1976.* Among other things, she asked to be allowed to perfect her appeal to the New Jersey Supreme Court. (A28-30).

In his answer dated August 6, 1976, the Trustee opposed a further modification of the stay as to the State Court Action. Initially, the Trustee also asked the bankruptcy court to reimpose the stay of suits as to the NLRB Proceeding. (A33-39). Later, the Trustee reconsidered his position and by a letter dated October 19, 1976, informed Bankruptcy Judge Galgay and Swinick that he was not opposed to having the NLRB Proceeding go forward. However, the Trustee continued to resist a modification of the stay as to the State Court Action.

The Trustee saw no reason for an appeal to the Supreme Court of New Jersey because the NLRB Proceeding would determine the amount of all claims, if any, that Swinick had against Grant. Additionallly, a further appeal in the state court would have been of little practical value because the only

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* At the time of Grant's adjudication as a bankrupt on April 13, 1976, the bankruptcy court entered an order supplementing the automatic stays under Bankruptcy Rules 401 and 601. The order of April 13, 1976, provided that the automatic stay "shall not apply to the extent that any stay may have been modified pursuant to an order of the Court during the Chapter XI case. . . ." Consequently, Swinick was free to continue with the NLRB proceeding and the stay did not again need to be modified merely as a result of Grant's adjudication as a bankrupt.

issue was a jurisdictional question of preemption by the NLRA. Even if the New Jersey Supreme Court were to have reversed the Appellate Division, a trial would still be necessary to determine whether Swinick had a claim against Grant, and, if so, the extent of her damages. Moreover, the State Court Action eventually would have become moot when the NLRB Proceeding reached its conclusion. At that time, all of Swinick's claims against Grant would have been finally determined, and no further purpose would be served by the State Court Action. Consequently, any expense incurred in the State Court Action would have been wasted.

Swinick's new adversary proceeding came on for hearing before Bankruptcy Judge Calgay on August 24, 1976. (A32). The Trustee later served proposed findings of fact and conclusions of law, and the matter is now sub judice.

A hearing in the NLRB Proceeding was held on December 7, 1976, to decide the issue of Grant's liability. If it is determined that Grant unlawfully discharged Swinick, she will be entitled to another hearing on the amount of damages. As mentioned above, the Trustee expects that the outcome of these hearings will determine the full amount of all claims, if any, that Swinick has against Grant's estate.

E. Summary

In summary, there is a narrow record on appeal

before this Court. The record contains little more than Swinick's complaint dated December 29, 1975, the answer of the debtor-in-possession dated January 21, 1976, the transcript of the hearings before the bankruptcy court on January 26, 1976, February 2, 1976, and March 1, 1976, the bankruptcy judge's order of March 10, 1976, and the order below dated July 1, 1976. From these facts, it is evident that District Judge Knapp did not err in determining that the bankruptcy judge had not abused his discretion by denying costs to Swinick and by permitting her to appeal no farther than the Appellate Division in New Jersey.

I

THE BANKRUPTCY JUDGE DID NOT ABUSE HIS DISCRETION BY REFUSING TO ALLOW AN APPEAL TO THE STATE SUPREME COURT WHEN THE NLRB PROCEEDING WOULD COMPLETELY LIQUIDATE APPELLANT'S CLAIM

Pursuant to Chapter XI Rule 11-44(a), the filing by Grant of a petition for an arrangement under Chapter XI Rule 11-6 and Section 322 of the Bankruptcy Act operated as an automatic stay of "the continuation of any court or other proceeding against the debtor . . . ."* Consequently, Swinick was automatically enjoined on October 2, 1975, from continuing her prosecution of the State Court Action and the NLRB Proceeding.

* Chapter XI Rule 11-44(a) supplements and reinforces Section 314 of the Bankruptcy Act (11 U.S.C. §714), which provides,

(footnote continued)

However, the bankruptcy court may, in an appropriate case, modify the stay pursuant to Chapter XI Rule 11-44(d), which provides in pertinent part:

> "(d) Relief from Stay....The court may, for cause shown, terminate, annul, modify or condition such stay." (Emphasis supplied).

The underscored language of the rule makes it clear that a decision to modify the stay is made in the exercise of the bankruptcy court's sound discretion. Courts have uniformly upheld this interpretation. "The power to stay does not

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(Footnote continued)

> "The court may, in addition to the relief provided by section 11 of this Act and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits other than suits to enforce liens upon the property of the debtor, and may, upon notice and for cause shown, enjoin or stay until final decree any act or the commencement or continuation of any proceedings to enforce any lien upon the property of a debtor."

Chapter XI Rule 11-44(a), entitled "Stay of Actions and Lien Enforcement," states,

> "A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

imply that it is to be, or appropriately may be, exerted without regard to the facts. The granting or withholding of injunction is left to the discretion of the court." Forest v. Munson Steamship Lines, 299 U.S. 77, 83 (1936) (under former Section 77B); In re Yale Express System, Inc., 384 F.2d 990, 991 (2d Cir. 1967); Detroit Trust Co. v. Campbell River Timber Co., 98 F.2d 389, 393, (9th Cir. 1938); In re Laufer, 230 F.2d 866, 868 (2d Cir. 1956); In re Adolf Gobel, Inc., 89 F.2d 171, 172 (2d Cir. 1937); In re Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935); In re Zeckendorf, 326 F. Supp. 182, 184 (S.D.N.Y. 1971); In re Young Properties Corp., 5 Collier, Bankruptcy Cases, 414, 416 (S.D. Cal. July 28, 1975); In re Bateman Financial Corp., 5 Collier, Bankruptcy Cases, 488, 491 (M.D. Fla. July 23, 1975); In re Groundhog Mountain Corp., 4 Collier, Bankruptcy Cases, 387, 390 (S.D.N.Y. May 6, 1975); In re Jennifer Mall, 2 Collier, Bankruptcy Cases, 657, 662 (D.D.C. October 31, 1974).

Since the granting or withholding of the stay is an exercise of discretion, a bankruptcy judge's decision may not be reversed unless it is shown to be an abuse of discretion. Foust, supra; Laufer, supra; Zeckendorf, supra; Bateman, supra.

The Rule 11-44 stay, in effect from October 2, 1975,

through April 13, 1976,* protected the exclusivity of the bankruptcy court's jurisdiction and ensured that there was no unnecessary depletion of the assets of the estate. In

* On April 13, 1976, Grant was adjudged a bankrupt, and its Chapter XI case was converted to a liquidation under Chapters I - VII of the Bankruptcy Act (11 U.S.C. §§1-112). At the present time, the applicable stay is that under Bankruptcy Rule 401(a), which provides, in part,

> "(a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt...."

In addition, the stay under Bankruptcy Rule 401 has been supplemented by an order entered in the bankruptcy court on April 13, 1976. Paragraph 1' of that order provides, in part,

> "All persons...are jointly and severally enjoined and stayed from commencing or continuing any action, court or other proceeding against Grant or its property or for the enforcement of any judgment against Grant ...subject to the further order of the Court, except that this provision shall not apply to the extent that any stay may have been modified pursuant to an order of the Court during the course of the Chapter XI case...."

The duration of stays in bankruptcy cases is governed by Bankruptcy Rule 401(b), which provides, in part,

> "(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto."

(footnote continued)

delineating those circumstances in which the assets of the debtor's estate are properly expended in litigation outside of the bankruptcy court, this Court, in In re Laufer, supra, echoed the sentiment of the Supreme Court in Foust by holding that whether the "state court proceeding would embarrass or delay the administration of the estate of the debtor" is the controlling factor. Laufer, supra, at 868. Thus, the stay assures "the order[ly] administration of the estate ..., preserve[s] the assets for the benefit of all creditors, and ensures equality of treatment of creditors of the same class." In re Blair & Co., Inc., 70B 755 (S.D.N.Y. June 6, 1973) at 4-5. And in considering whether to modify the Rule 11-44 stay, the court must examine "the balance of hurt between the parties, the nature of the interests to be protected, and the overall congenial statutory purpose of Chapter XI." In re Groundhog Mountain Corp., supra, at 393. Modification of the stay is only justified when "no sound reason is shown [by the debtor] to require [the stay] and where there is good reason for its modification." In re Zeckendorf,

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(footnote continued)

Although Bankruptcy Judge Galgay's order of March 10, 1976, was made under Chapter XI Rule 11-44, Grant's subsequent adjudication as a bankrupt has no effect on the issues before this Court because the pertinent stay provisions in Bankruptcy Rule 401 and Chapter XI Rule 11-44 are essentially identical.

supra, at 184. See also Teledyne Industries, Inc. v. Eon Corp., 373 F.Supp. 191, 203 (S.D.N.Y. 1974).

In a case analogous to this, a bankruptcy judge in the Southern District of California has found the applicable criteria to be:

> (1) whether the issues are entirely local rather than Federal and whether the state court is a more convenient and appropriate forum to determine them.
>
> (2) whether a state court trial will result in liquidation of the amount of the plaintiff's claim in the bankruptcy proceedings.
>
> (3) whether the prosecution of the action in the state court will not interfere with the proper administration of the debtor's estate, nor with the formulation of the plan of reorganization. In re Young Properties, supra, at 417.

Examining the facts of the instant case in light of these criteria, it is clear that the bankruptcy judge acted well within the bounds of his allowable discretion. In the first place, an oral argument in the Appellate Division or an appeal to the New Jersey Supreme Court would have been a considerable expense for the estate. In contrast, Swinick can offer no reason why an oral argument was essential or why an appeal to the Supreme Court of New Jersey was appropriate. An appeal of any sort would not have advanced the cause of liquidating Swinick's claims against Grant. As set forth above, the only issue on appeal in the State Court Action was

the question of federal preemption. It would have taken months, if not years, of further litigation* before the New Jersey courts could decide the amount of any claim Swinick has against Grant. On the other hand, the hearing already held in the NLRB Proceeding will soon settle whether Swinick has any claim against Grant. Any further expense by the Trustee in the State Court Action would therefore have been a duplication of effort and an unjustifiable waste of the assets of the estate.

Moreover, the equities lie with the Trustee when balancing the hurt between the parties. With the NLRB Proceeding in progress, continuing the stay did not disadvantage or prejudice Swinick. On the other hand, permitting an appeal would not have conferred a benefit on anyone.

Finally, a federal agency rather than a local court is the appropriate forum to determine the question of liability and damages arising from unfair labor practices within the purview of the NLRA. The application of that act must be left to a federal forum with expertise and experience in the area. In that regard, two courts in New Jersey agreed by dismissing for lack of jurisdiction over Appellant's claim.

Thus, this case makes the strongest of showings that a further modification of the stay would have embarrassed the

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* This assumes that the Supreme Court were to reverse and remand the State Court Action to the Superior Court for a trial on the merits.

administration of the debtor's estate. Consequently, no further modification of the stay was in order. Foust v. Munson Steamship Lines, 299 U.S. 77 (1936); Thompson v. Texas Mexican Ry., 328 U.S. 134 (1946); In re Laufer, 230 F.2d 866 (2d Cir. 1956); In re Adolf Gobel, Inc., 89 F.2d 171 (2d Cir. 1937); In re Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935); In re Zeckendorf, 326 F. Supp. 182 (S.D.N.Y. 1971).*

The facts and applicable law simply do not support or establish any basis upon which the order of the bankruptcy court may be reversed as an abuse of discretion. Appellant has been granted all the relief to which she is entitled. In fact, Swinick was granted nearly all of the relief she requested. The order of the District Court should therefore be affirmed.

II

APPELLANT HAS NO CONSTITUTIONAL RIGHT TO AN ORAL ARGUMENT

Swinick argues, in substance, that Bankruptcy Judge Galgay erred in not allowing her an oral argument before the Appellate Division in New Jersey. In this respect, it should

* It is noteworthy that the bankruptcy court was not indifferent to the need for protecting Swinick to the fullest extent reasonable under the circumstances. Fortunately, the State Court Action had advanced to a point where Swinick could proceed with her appeal pending before the Appellate Division in New Jersey on the basis of previously filed briefs but without oral argument. Thus, Swinick could have her day in court at no expense to the estate.

be emphasized that Swinick was represented by counsel who had filed a brief on her behalf with the Appellate Division in New Jersey. (Tr. 7). Moreover, Swinick is incorrect in asserting that she had a constitutional right to oral argument.

The question of whether there is a blanket constitutional right to oral argument was settled by the Supreme Court in FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949). There, the Court, in a case involving oral argument before a federal administrative agency, held,

> "Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised. Equally certainly it has left wide discretion to Congress in creating the procedures to be followed in both administrative and judicial proceedings, as well as in their conjunction." Id. at 276.*

Following the Supreme Court's decision in WJR and Rule 34 of the Federal Rules of Appellate Procedure,** the

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* The WJR decision is particularly pertinent here because the Federal Communications Commission, in failing to hold an oral argument on the question before it, had, as the Court of Appeals found, treated the question "as a matter of law, in judicial parlance essentially as though raised upon demurrer...." Id. at 270-71. Similarly, the Appellate Division in New Jersey was ruling upon a motion to dismiss on a basically jurisdictional issue.

** FRAP 34, entitled "Oral Argument", provides, in part, "(a) Notice of Argument; Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard....(b) Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument...."

courts of appeal in at least two circuits have established rules providing for summary disposition of appeals on the basis of briefs, but without oral argument. NLRB v. Local No. 42, International Ass'n of Heat & Frost Insulators & Asbestos Workers, 476 F.2d 275 (3rd Cir. 1973); George W. Bennett Bryson & Co. v. Norton Lilly & Co., 502 F.2d 1045 (5th Cir. 1974); Floyd v. Resor, 409 F.2d 714 (5th Cir. 1969); Fruehauf Corp. v. McIntire, 408 F.2d 910 (5th Cir. 1969); Carnage v. Sanborn, 408 F.2d 1024 (5th Cir. 1969). Both the Third and the Fifth Circuits, interpreting WJR, have concluded that there is no constitutional right to an oral argument. In Bennet Bryson, supra, the court said,

> "Indeed, the Third Circuit, in a recent en banc decision, rejected a contention that denial of oral argument and disposition by summary decision pursuant to Third Circuit Local Rule 12(6) constitute a violation of due process as guaranteed by the Fifth Amendment. [Citing Local No. 42, supra] We agree with the Third Circuit on the constitutional issue. Oral argument is not always helpful, nor is it the sine qua non of fair dispositions." Bennet Bryson, supra., at 1050-51.*

Moreover, the assumption under New Jersey appellate practice is that there will be no oral argument. The procedure

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* This Court has held, in the context of rehearing en banc, that "The decision to grant or not grant oral arguments on cases in banc is purely a matter of discretion...." SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1310 (2d Cir. 1971). Similarly, the Trustee submits that a bankruptcy judge has discretion to limit oral argument in an action pending in another forum when that action is within the scope of the bankruptcy court's injunctive powers under the Bankruptcy Act and Rules.

specifically provides that appeals will be submitted upon the briefs unless the parties request oral argument.* With oral argument being merely optional in New Jersey, it is all the more evident that Bankruptcy Judge Galgay could permit the appeal to go forward without oral argument.

Finally, the entire controversy involving oral argument is moot. The New Jersey court has already decided the appeal and concluded that Swinick's claims have been preempted by the NRLA. Consequently, no controversy exists between the parties of "'sufficient immediacy and realty'." Golden v. Zwickler, 394 U.S. 103, 109 (1969); Accord, Hall v. Beals, 396 U.S. 45 (1969); St. Pierre v. United States, 319 U.S. 41 (1943); Brownlow v. Schwartz, 261 U.S. 216 (1923).

* Rule 2:11-1, entitled "Argument; Determination; Costs; Rehearing", of the New Jersey Rules Governing Appellate Practice, provides, in relevant part,

> "(a) Calendar. The clerk of the Appellate Court shall enter all appeals upon a docket in chronological order as of the date of the filing of appellant's brief and all cases shall be argued or submitted for consideration without argument in that order....
>
> "(b) Oral Argument. In the Supreme Court, appeals shall be argued orally unless the court dispenses with argument. In the Appellate Division appeals shall be submitted for consideration without argument, unless argument is requested by one of the parties within 14 days after the service of the respondent's brief or as ordered by the court."

In Hall, supra, the Supreme Court expressly relied upon its previous holding in Mills v. Green, 159 U.S. 651 (1895), where it was held:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court ... an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." 159 U.S. at 653 [emphasis supplied].

Similarly, in Brownlow v. Schwartz, supra, the Court held that it would not decide the merits of a case "when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate.... To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain." 261 U.S. at 217-18.

In the State Court Action, the Appellate Division has already disposed of the appeal. Now that Swinick has filed a notice of appeal, whatever jurisdiction there may be in the State Court Action is now lodged in the New Jersey Supreme Court. Thus, it appears that this Court is not in a position to direct the Appellate Division in New Jersey to

reopen its decision and compel the parties to hold oral argument. For this reason, the question of oral argument is moot. In any event, Swinick had no constitutional right to oral argument, and the bankruptcy judge committed no error.

III

THE BANKRUPTCY JUDGE DID NOT ERR IN DECLINING TO ALLOW COSTS TO APPELLANT

Swinick alleges that Bankruptcy Judge Galgay erred by failing to allow her certain costs she allegedly incurred in the adversary proceeding, including medical expenses she claims to have sustained from having to sit in a drafty courtroom. The record, however, demonstrates that no error was committed. As District Judge Knapp ruled, "The granting of costs is a matter firmly within the jurisdiction of the trial judge, and we cannot find that such discretion has been abused." (Order of July 1, 1976).

The court below was correct in holding that the granting of costs is discretionary in bankruptcy cases. In both bankruptcy cases and Chapter XI cases, the granting of costs in adversary proceedings is governed by Bankruptcy Rule 754,* entitled, "Judgments; Costs," which

* At the time Judge Galgay entered his order of March 10, 1976, Grant's case was still pending under Chapter XI of the Bankruptcy Act. As such, Bankruptcy Rule 754 was made applicable in the Chapter XI case by Chapter XI Rule 11-61.

provides, "(b) Costs. On one day's notice costs may be taxed and judgment therefor rendered by the court." [Emphasis supplied].

The Advisory Committee's Note to Bankruptcy Rule 754 explicitly states that the taxing of costs is discretionary. Referring to Subsection (b) of Rule 754, the Note states,

> "Under § 2a(18) of the Act the bankruptcy courts have followed the equity practice of allowing costs to either party as a matter of discretion. 1 Collier, 381-82 (1968). Because of the adverse effect on creditors of imposing costs on a bankrupt estate and the reciprocal equities of those involved in litigation with such an estate, costs have often been denied either party in contested proceedings in bankruptcy cases. Subdivision (b) preserves the traditional approach by leaving the taxation of costs in such proceedings to the court's discretion."

Regarding costs, Bankruptcy Rule 754(b) is consistent with the interpretation given to Section 2a(18) of the Bankruptcy Act* (11 U.S.C., § 11a(18)). Interpreting Section 2a(18), this Court concluded that granting of costs is discretionary.

> "Neither are we persuaded that the Referee erred in concluding that each party herein

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* Section 2a(18) gives the court power to "tax costs and render judgments therefor against the unsuccessful party, against the successful party for cause, in part against each of the parties, and against estates, in proceedings under this Act...."

> should bear its own costs. § 2a(18) of the Bankruptcy Act permits the Referee, on his own discretion, to assess costs in part to each of the parties. 1 Collier on Bankruptcy, Par. 2.71 (1968). We have examined the record and find no abuse of discretion therein." In re Brendan Reilly Associates, Inc., 405 F.2d 487, 489 (2d Cir. 1968).

Other courts considering the issue have ruled, consistent with the general principle that allowance of costs is discretionary,* that the taxing of costs in bankruptcy cases is discretionary. In re Joslyn's Estate, 171 F.2d 159, 168 (7th Cir. 1948) ("As to the costs taxed to [an asserted creditor], we recognize that the court has a wide discretion in this respect."); In re Industrial Sound Engineering, Inc., 230 F. Supp. 154, 156 (E.D. Wis. 1964) ("Likewise, a bankruptcy court has wide discretion in taxing costs."); In re Standard Commercial Tobacco Co., 34 F. Supp. 304, 314 (S.D.N.Y. 1940) ("There is not any reason for disturbing the Referee's ruling on costs. In causes of this kind costs are discretionary and the Referee's discretion was wisely exercised herein."); In re Roy Lawson Shelor, 4 Collier Bankruptcy Cases, 311, 315 (W.D. Vir. 1975).

In this case, Swinick has demonstrated no basis for asserting that the failure to grant costs was an abuse of discretion. If anything, the record indicates it would have been an abuse of discretion had the court taxed costs

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* Sprague v. Ticonic National Bank, 307 U.S. 161 (1939); Newton v. Consolidated Gas Company, 265 U.S. 78 (1924).

against the estate. Swinick, by repeatedly bringing actions against the estate in the bankruptcy court and by taking frivolous appeals, has caused the estate to incur thousands of dollars of unnecessary attorneys' fees in a matter involving a relatively small claim of an unsecured creditor. To compound the injury by taxing costs in favor of Swinick would only have increased the damage that is being done to the estate's other creditors. In short, the record does not indicate any abuse of discretion regarding costs.

CONCLUSION

For the reasons set forth above, the Trustee respectfully submits that the order below should be affirmed in its entirety.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Co-Attorneys for the Trustee
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

Of Counsel,

Harvey R. Miller,
William J. Rochelle, III.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re	:
W. T. GRANT COMPANY,	:
Bankrupt,	:
FRANCES SWINICK,	:
	Docket No. 76-5031
Appellant,	:
-against-	:
CHARLES G. RODMAN, as Trustee of the Estate of W. T. Grant Company, Bankrupt,	:
Appellee.	

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

WILLIAM J. ROCHELLE, III, being sworn says:

I am associated with the firm of Weil, Gotshal & Manges, attorneys for the appellee-trustee. On January 4, 1977, I served three copies of the brief of the appellee-trustee upon appellant Frances Swinick, 3 High Street, New Brunswick, New Jersey by depositing same in a postpaid properly addressed wrapper, in an

official depository under the exclusive care and custody of the United States Postal Service within the City and State of New York.

William J. Rochelle, III

Sworn to before me this
4th day of January, 1977.

Notary Public

BETTY E. KANE
Notary Public, State of New York
No. 31-4518754
Qualified in New York County
Commission Expires March 30, 19 78

Index No. 76-5031 *Year 19*

UNITED STATES COURT OF APPEALS
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W. T. GRANT COMPANY,

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FRANCES SWINICK,

Appellant,

-against-

CHARLES G. RODMAN, as Trustee of the Estate of W. T. Grant Company, Bankrupt, Appellee.

AFFIDAVIT OF SERVICE BY MAIL

Attorneys for **WEIL, GOTSHAL & MANGES**
Appellee-Trustee

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022
(212) 758-7800

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....

Attorney(s) for

PLEASE TAKE NOTICE

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☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within named court on* *19*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on* *19* *, at* *M.*

Dated:

WEIL, GOTSHAL & MANGES

Attorneys for

767 FIFTH AVENUE
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10022

To:

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York State, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action: I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 19

.....

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 19 , I served a true copy of the annexed in the following manner:

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☐ Service By Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service within the State of New York, addressed to the last known address of the addressee(s) as indicated below:

☐ Personal Service — by delivering the same personally to the persons and at the addresses indicated below:

Sworn to before me on , 19

.....

.....
(Print signer's name below signature)